JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

No. 638

LEO CRUMLEY,
Petitioner,

v.

THE STATE OF TENNESSEE,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the Supreme Court of the State of Tennessee.**

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, LEO CRUMLEY, defendant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Tennessee which was entered against him on June 16, 1969, in the case of the **State of Tennessee v. Leo Crumley.** A copy of the order of the Tennessee Supreme Court is printed in the Appendix hereto.

## OPINIONS BELOW.

The opinion of the Criminal Court of Marion County, Tennessee is printed in the Appendix hereto, *infra,* Appendix A and Appendix B (pp. A-1 and A-3). The order of the Court of Appeals of the State of Tennessee is unreported and is printed in the Appendix hereto, *infra,* pp. A-5-A-7. The order of the Supreme Court of the State of Tennessee which was entered on June 16, 1969, is unreported and is printed in the Appendix hereto, *infra,* p. A-8.

## JURISDICTION.

The judgment of the Supreme Court of the State of Tennessee, denying the petition for writ of certiorari was entered on June 20, 1969.

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

## QUESTIONS PRESENTED.

Should the trial court have permitted witness Lee Beene to be present in the courtroom during the testimony of witness William S. Bynum in violation of the rule of exclusion of witnesses?

## STATEMENT OF THE CASE.

On June 5, 1967 indictments were filed charging the defendant-appellant Leo Crumley, and a co-defendant, Robert Cross, with possession of burglary tools and third degree burglary on or about February 20, 1967. The two cases were consolidated for trial. The prosecutor in the third degree burglary case was police officer Beene and the prosecutor in the possession of burglary tools case was

Jeff Payne. Officer William S. Bynum was a witness in both cases and was called upon to testify after prosecutor Payne but before prosecutor Beene. Over counsel's objections, the court said that since officer Beene was a prosecutor in one of the cases, the rule of exclusion of witnesses wasn't applicable to him. By so ruling, the trial court allowed officer Beene to hear the testimony of non-prosecuting witness Bynum, the officer who assisted him in making the arrest, before he testified himself (App. p. 4-6; Tr. 18-20).

On July 5, 1967, after the jury trial and a plea of not guilty, the jury found the defendant, Leo Crumley, guilty of possession of burglary tools and third degree burglary, and the defendant was sentenced in the third degree burglary case to three years and on the possession of burglary tools to one to three years in the state penitentiary. On October 6, 1967, the Trial Court overruled the defendant's motion for a new trial. An appeal was perfected to the Criminal Court of Appeals, where the judgment of the Trial Court was affirmed. The Supreme Court of Tennessee denied certiorari June 16, 1969, the Court giving no reasons for its decision.

## REASONS FOR GRANTING THE WRIT.

> "The purpose of sequestrating witnesses is to detect falsehood as well as to prevent any witness from coloring his, or her, testimony either purposely or through influence by talking to other witnesses and hearing them talk."
>
> **Nance v. State**, 358 S. W. 2d 327, 210 Tenn. 328 (1962).

> "The practice of putting witnesses under the rule is a time-honored one and should not be abandoned . . . [W]itnesses may, and often do, shape their testi-

mony to match that given by other witnesses within their hearing. To prevent such matching of testimony is the prime purpose of putting witnesses under the rule."

**Charles v. United States**, 215 F. 2d 825 (1954).

The best analysis of the rule of exclusion is found in **Wigmore on Evidence**, TE, Vol. VI, Section 1837, et seq. The reason for the rule of exclusion is obvious. Wigmore uses the example of the story of Daniel's Judgment of Susanna's case from the Scriptures where two witnesses bore false witness against Susanna. Daniel had the witnesses brought before him separately and discrepancies in their testimony showed the falsity of their testimony. Wigmore states that sequestration of witnesses is properly demandable as a matter of right (Section 1839):

"It seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defense that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, and in the case when it is most useful (namely, a combination to perjure), it is almost the only hope of an innocent appellant."

Section 1838 of **Wigmore** states that:

"If the hearing of an opposing witness were permitted the listening witnesses could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventive; i. e., it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony."

"Where the prosecutor is allowed to remain in the courtroom, the court should impose as a condition that the prosecutor be used as the first witness."

**Smart v. State**, 112 Tenn. 539, 551, 80 S. W. 586 (1903).

In this case the witness Beene was listed as a prosecutor and should have either been used as the first witness or have been excluded from the courtroom during the testimony of Officer Bynum. There were conflicts in their testimony even though Officer Beene remained in the courtroom and it can only be concluded that further conflicts would have resulted had Officer Beene been excluded from the courtroom during that testimony.

This is a matter of broad nationwide concern to all criminal defendants who are confronted with witnesses testifying against them. Therefore, it is respectfully submitted that the Trial Judge's failure to apply the exclusion rule unfairly prejudiced the state's witnesses to the detriment of the Petitioner.

## CONCLUSION.

For the foregoing reason, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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